

Appl. No. 10/764,215
Docket No. P142M
Amdt. dated September 10, 2007
Reply to Office Action mailed on April 9, 2007
Customer No. 27752

REMARKS

Claim Status

Claims 1 – 17 are pending in the present application. No additional claims fee is believed to be due. Claims 10 – 17 have been withdrawn as a result of an earlier restriction requirement. Claim 1 has been amended to further define the composition. Claims 2, 3, and 8 have been rejected under 35 U.S.C. § 112 and claims 1 – 9 have been rejected under 35 U.S.C. § 102. It is believed these changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

Rejection Under 35 U.S.C. § 112, Second Paragraph

Claims 2, 3 and 8 have been rejected under 35 U.S.C. § 112, second paragraph. Claims 3 and 8 are dependent upon claim 2. The Office Action states that the “phrase ‘less than about’ fails to set forth a lower limit for the concentration of the agent. Such phrase covers 0% of the agent in the composition. The word ‘less than’ conflicts with the word ‘about’, both of them cannot be used in the same phrase.” Applicants respectfully traverse this rejection.

Claim 2 is dependent upon claim 1 which claims the presence of astaxanthin in the composition. Claim 1 does not place a limit on the amount of astaxanthin present in the composition. Claim 1 simply claims the presence of astaxanthin and, therefore, astaxanthin is present in the composition in at least some amount. Claim 2 reads “less than about 3% of astaxanthin.” While the phrase may cover 0% of the agent in the composition, Applicants respectfully submit that as claim 2 is dependent from claim 1, the agent is present in the composition of claim 2 in at least some amount, as noted by the language of claim 1, and that the upper limit of the agent in the composition of claim 2 is less than about 3%. Applicants, therefore, believe that claim 2 is a narrower claim over claim 1.

Additionally, the Office Action has not provided any basis or reasoning as to how the word “less than” conflicts with the word “about” and why both words “cannot be used in the same phrase.” The use of the term “about” permits some leeway in the amount of a required constituent in a claim. *Chemical Separation Technology, Inc. v. U.S.*, 51 Fed.

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Cl. 771, 63 U.S.P.Q.2d 1114, 1123, 1124 (2002). The term "about" should be given its ordinary and accepted meaning of "approximately" unless the patentee clearly redefines "about" in the specification. *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 73 U.S.P.Q.2d 1641, 1648 (Fed. Cir. 2005). The use of the term "about," therefore, is clear and flexible. The word "about 3%" is similar in meaning to "approximately 3%" and the phrase "less than about 3%" provides for an amount of astaxanthin that is less than approximately 3%.

Applicants respectfully submit that the range present in claim 2 has been presented with enough specificity to allow one of skill in the art to be reasonably apprised of the scope of the claim. Applicants respectfully request reconsideration and withdrawal of the rejection.

Rejection Under 35 U.S.C. § 102 Over Oliveira

Claims 1 – 9 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Oliveira et al. (US Publication No. 2003/0157239)("Oliveira"). Applicants respectfully traverse this rejection.

Oliveira discloses that a:

High protein, low soluble-sugar, oil containing soybean meal suitable for use as a partial or full replacement of fish meal and other protein and energy sources in the manufacture of fish and land animal feeds and petfoods, is produced by a process in which oil is mechanically extracted from dehulled, flaked soybeans.

Abstract. Oliveira, however, fails to teach each and every element of the claims.

Claim 1 has been amended to provide that the composition may attenuate inflammation, enhance immune response, enhance longevity, or combinations thereof. Oliveira fails to teach a composition that may attenuate inflammation, enhance immune response, enhance longevity or combinations thereof. Oliveira, therefore, fails to anticipate the claims. Applicants respectfully request reconsideration and withdrawal of the rejection.

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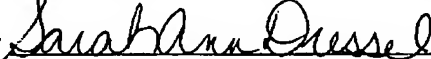
Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied reference. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application and allowance of the pending claims are respectfully requested.

Respectfully submitted,

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